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No. 04-

In the Supreme Court of the United States

NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, UNITED STATES CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND TEXAS COALITION OF CITIES FOR UTILITIES ISSUES,
Cross-Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, BRAND X INTERNET SERVICES, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

HENRY W. UNDERHILL
SONA N. PANCHOLY
LANI L. WILLIAMS
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION
1110 VERMONT AVE., NW
SUITE 200
WASHINGTON, D.C. 20005
(202) 266-5424

TILLMAN L. LAY*
Counsel of Record
MILLER, CANFIELD, PADDOCK AND STONE, PLC
1900 K STREET, N.W.
SUITE 880
WASHINGTON, D.C. 20006
(202) 429-5575

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTIONS PRESENTED

1. Whether the definition of "cable service" — the one-way transmission of information that a cable operator makes available to all subscribers generally and any subscriber interaction required for the selection or use of that information, 47 U.S.C. §§ 522(6) & 522(14) — includes cable modem service.

2. Whether the Ninth Circuit erred when it relied on *stare decisis* to affirm, without discussion, the Federal Communications Commission's determination that cable modem service is not within the meaning of "cable service" as defined in 47 U.S.C. § 522(6).

PARTIES TO THE PROCEEDING

Cross-Petitioners National League of Cities ("NLC"), National Association of Telecommunications Officers and Advisors ("NATOA"), United States Conference of Mayors ("USCM"), National Association of Counties ("NACo"), and Texas Coalition of Cities for Utilities Issues ("TCCFUI") (collectively, "Cross-Petitioners"), were petitioners in the consolidated court of appeal proceedings below.

Cross-respondents Federal Communications Commission and the United States of America were respondents in the court of appeal below.

Cross-respondents who were petitioners in the court of appeals below are: Brand X Internet LLC, Earthlink, Inc., Verizon Internet Solutions d/b/a/ Verizon.net, Verizon Telephone Companies, Consumer Federation of America, Consumers Union, Center for Digital Democracy, People of the State of California, ex rel. Bill Lockyer, the Public Utilities Commission of the State of California, Buckingham Township, Conestoga Township, East Hempfield, Township, Martic Township, and Providence Township, Pennsylvania.

Cross-respondents who were intervenors in the court of appeals below are: National Cable & Telecommunications Association, SBC Communications Inc., World-Com, Inc., Cox Communications, Inc., AT&T Corp., Competitive Telecommunications Association, Vermont Public Service Board, the Information Technology Association of America, Focal Communications Corporation, Charter Communications, Inc., Vermont Public Service Board, the State of Vermont, the Vermont Department of Public Service, Utility, Cable & Telecommunications Committee of the City Council of New Orleans, Association of Communications

Enterprises, Time Warner, Inc., Time Warner Cable, the City and County of San Francisco, BellSouth Corporation, BellSouth Telecommunications, Inc.; Alliance for Community Media; American Public Works Association; City of Alexandria, Virginia; City of Austin, Texas; City of Charlotte and Mecklenberg County, North Carolina; City of Chicago, Illinois; City of Concord, California; City and County of Denver, Colorado; City of Dubuque, Iowa; City of Indianapolis, Indiana; City of Irvine, California; City of Kansas City, Missouri; City of Los Angeles, California; City of Olympia, Washington; City of Plano, Texas; City of Rockville, Maryland; City of San Antonio; City of St. Paul, Minnesota; City of Tacoma, Washington; City of Takoma Park, Maryland; City of Tucson, Arizona; City of Virginia Beach, Virginia; Community Programming Board of Forest Park, Greenhills and Springfield Township, Ohio; Greater Metro Telecommunications Commission, Colorado; Illinois Association of Telecommunications Officers and Advisors; International Municipal Lawyer Association; Metropolitan Area Communications Commission, Oregon; Metropolitan Government of Nashville and Davidson County; Miami Valley Cable Council, Ohio; Minnesota Association of Communication Telecommunications Administrators; Montgomery County, Maryland; Mount Hood Cable Regulatory Commission, Oregon; Piedmont Triad Council of Governments, North Carolina; Texas Association of Telecommunications Officers and Advisors (TATOA); Village of Buffalo Grove, Illinois; Village of Hoffman Estates, Illinois; Village of Oak Park, Illinois; Village of Skokie, Illinois.

Pursuant to Rule 29.6 of this Court's rules, Cross-Petitioners state as follows:

NLC, NATOA, USCM, NACo and TCCFUI are non-profit associations, and no publicly held company owns an interest of 10% or more in any of them.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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**CONDITIONAL CROSS-PETITION
FOR A WRIT OF CERTIORARI**

Pursuant to Rules 12.5 and 13.4 of this Court's rules, Cross-Petitioners, NLC, NATOA, USCM, NACo and TCCFUI, respectfully request that, if the Court grants the petition for writ of certiorari in *Federal Communications Commission and United States, et al. v. Brand X Internet Services, et al.*, No. 04-281 (filed Aug. 27, 2004), and/or the petition for writ of certiorari in *National Cable & Telecommunications Association, et al. v. Brand X Internet*

Services, et al., No. 04-277 (filed Aug. 30, 2004), then the Court also should issue a writ of certiorari to review the judgment of the court of appeals on the questions presented in this conditional cross-petition.

OPINION AND ORDER BELOW

The Conditional Cross-Petitioners incorporate by reference the "Opinions Below" section in the Petition for Writ of Certiorari in No. 04-277 ("FCC Petition").[1]

JURISDICTION

The judgment of the court of appeals was entered on October 6, 2003. Cross-Petitioners filed a timely petition for rehearing on November 19, 2003, which the court of appeals denied on March 31, 2004 (FCC App. 204a-207a). On June 16, 2004, Justice O'Connor extended the time for filing a petition for certiorari through July 29, 2004, and again extended the time for filing on July 20, 2004 until August 30, 2004. The FCC Petition was filed on August 27, 2004, the NCTA Petition was filed on August 30, 2004, and the response date for each was set as September 30, 2004. The

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[1] Copies of the Federal Communications Commission's *Declaratory Ruling* and the Ninth Circuit's opinion are reproduced in the Appendix to the FCC Petition and are not reproduced here. References to the FCC Petition will be cited as "FCC Pet." References to the Appendix to the FCC Petition will be cited as "FCC App." References to the Appendix to this Conditional Cross-Petition will be cited as "Cross-Pet. App." References to the Petition for Writ of Certiorari in 04-281 ("NCTA Petition") will be cited as "NCTA Pet." References to the Appendix to the NCTA Petititon will be cited as "NCTA App."

Court has jurisdiction over this cross-petition under 28 U.S.C. § 1254(1) and Rules 12.5 and 13.4 of this Court.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Communications Act of 1934, 47 U.S.C. §§ 522(6) & (14) are set forth in the FCC App. at 212a-213a. An additional relevant provision of the Communications Act, 47 U.S.C. § 544(b), and relevant provisions of the Internet Tax Freedom Act, Pub. L. No. 105-277, Div. C, Title XI, § 1104(8)(B), *codified at* 47 U.S.C. § 151 note ("ITFA"), are set forth in Cross-Pet. App. at 1-3a.

STATEMENT

Cross-Petitioners agree with the Federal Communications Commission and the United States ("Federal Petitioners") and the petitioners in No. 04-277 ("NCTA Petitioners") that the classification of cable modem service under the Communications Act presents an issue of exceptional importance worthy of this Court's review. Cross-Petitioners also agree that the Court's review is particularly appropriate here because, absent such review, this important question would be decided nationwide by the Ninth Circuit's decision based solely on what that court perceived as the *stare decisis* effect of its prior decision in *AT&T v. City of Portland*, 216 F.3d 871 (9th Cir. 2002), without any meaningful judicial review of the merits of the arguments for the various possible classifications of cable modem service. Cross-Petitioners further agree that the court of appeals misconstrued this Court's precedents with regard to the application of *stare decisis* and *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Cross-Petitioners part ways, however, with the Federal Petitioners and the NCTA Petitioners with respect to their contention that proper application of the *Chevron* standard to the Commission decision under review necessarily means that decision must be upheld in all respects. This Court should not grant review of the court of appeals decision simply to rubber-stamp the FCC's *Declaratory Ruling*. Both the Federal Petitioners and the NCTA Petitioners improperly truncate the two-step evaluation required under *Chevron* and its progeny. If the Court grants review of the court of appeals decision, it should either (1) assess the *Declaratory Ruling*'s analysis of all three options for classifying cable modem service -- "information service," "cable service," and "telecommunications service" -- under the *Chevron* standard, or (2) remand the case to the Ninth Circuit with instructions that that court do so in the first instance.

1. In the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, Congress amended, and expanded, the definition of "cable service" by adding the phrase "or use" to the upstream half of the "cable service" definition in 47 U.S.C. § 522(6)(B). The amendment revised the definition to read as follows:

> the term 'cable service' means (A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection *or use* of such video programming or other programming service.

47 U.S.C. § 522(6) (emphasis added to reflect 1996 amendment).

Even before the 1996 amendment, the "cable service" definition extended beyond the multichannel video services traditionally thought of as cable television service to include any "information that a cable operator makes available to all subscribers generally." 47 U.S.C. § 522(14). The Joint Conference Report accompanying the 1996 Act makes clear what this expansion of the "cable service" definition was intended to accomplish:

> The conferees intend the amendment [adding "or use" to the "cable service" definition] to reflect the evolution of cable to include interactive services such as game channels and *information services* made available to subscribers by the cable operator, as well as *enhanced services*.[2]

The *1996 Conference Report*'s references to "information services" and "enhanced services" were no accident. In the very same 1996 Act, Congress also for the first time codified the term "information services" in the Communications Act, 47 U.S.C. § 153(20) (FCC App. at 208a). As the Commission's *Declaratory Ruling* under review here acknowledges, the new 1996 statutory definition of "information service" was itself derived from the Commission's prior rule definition of "enhanced services," which was then incorporated into the AT&T Consent Decree as the definition of "information services." (FCC App. at 89a-90a, n.163.) And as both the Department of Justice, in

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[2] H.R. Confer. Report No. 458, 104th Cong., 2d Sess. 169 ("*1996 Conference Report*"), *reprinted in* 1996 U.S.C.C.A.N. 124, 182 (emphasis added).

construing the AT&T Consent Decree,[3] and the Commission itself[4] had previously concluded, even under the narrower, pre-1996 version of the Communications Act's "cable service" definition, cable service was an "information service" within the meaning of that Consent Decree.

Thus, while the Federal Petitioners (FCC Pet. at 5-7) and the NCTA Petitioners (NCTA Pet. at 4 & 13) correctly identify the three possible classifications of cable modem service under the Communications Act ("information service," "cable service" and "telecommunications service"), they fail to point out that, unlike the "information service" and "telecommunications service" alternatives, the "information service" and "cable service" alternatives are *not* mutually exclusive. To the contrary, "cable service" includes any "information service" that "a cable operator makes available to all subscribers generally," 47 U.S.C. § 522(14), as well as all "subscriber interaction, if any, which is required for the selection or *use*" of such information, 47 U.S.C. § 522(6)(B) & (14) (emphasis added).

2. Prior to the Commission's March 2002 *Declaratory Ruling* that is the subject of this case, most cable operators treated cable modem service as a "cable service" and therefore included revenues derived from cable modem service in the revenue base on which those operators paid local governments the 5% franchise fee allowed by 47 U.S.C. § 542. (Indeed, two of the four NCTA Petitioners argued in

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[3] U.S. Department of Justice, Response to Public Comments on Proposed Modification of Final Judgment in *U.S. v. Western Electric Co.*, 47 Fed. Reg. 23320, 23335 (May 27, 1982).

[4] *Telephone Company-Cable Television, Cross-Ownership Rules*, Notice of Inquiry, 2 FCC Rcd 5092, 5096 n.26 (1987).

their comments to the Commission below that cable modem service was both a "cable service" and an "information service.") Moreover, contrary to the suggestion of the Federal Petitioners (FCC Pet. at 24-25), and the NCTA Petitioners (NCTA Pet. at 19), classifying cable modem service as a "cable service" under Title VI of the Communications Act would not expose cable modem service to extensive regulation at all. Rather, as an "other programming service," 47 U.S.C. § 522(14), rather than a "video programming service," 47 U.S.C. § 522(20), cable modem service would be largely unregulated because it would be preemptively exempt from most of the requirements of Title VI other than payment of franchise fees, 47 U.S.C. § 542, and customer service and privacy requirements, 47 U.S.C. §§ 551 & 552. *See also* 47 U.S.C. § 521(6) (Title VI designed to "promote competition in cable communications and minimize, unnecessary regulation that would impose an undue economic burden on cable systems").

3. As the Federal Petitioners (FCC Pet. at 10 & n. 3) and NCTA Petitioners (NCTA Pet. at 7-10) point out, prior to the Commission's *Declaratory Ruling*, a few courts had addressed the regulatory classification of cable modem service, with conflicting results. One court, for example, concluded that cable modem service is a "cable service."[5] Another concluded that cable modem service is a "information

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[5] *Media One Group, Inc. v. County of Henrico*, 97 F.Supp.2d 712, 715 (E.D. Va. 2000), *aff'd on other grounds*, 257 F.3d 356 (4th Cir. 2001).

service" but not a "cable service" or a "telecommunications service."[6] In *Portland*, the decision that proved dispositive of the outcome in the court of appeals below, the Ninth Circuit ruled that cable modem service is neither a "cable service" nor a single, integrated "information service," but instead contains separate "telecommunications service" and "information service" elements. 216 F.2d at 876-879. As the Federal Petitioners (FCC Pet. at 13) and the NCTA Petitioners (NCTA Pet. at 6 & 12), correctly recognize, however, the "parties did not brief the regulatory classification issue" in *Portland*. (FCC App. at 115a.) As a result, the *Portland* court decided the case on a ground not argued by the parties and, perhaps more importantly, without the benefit of any briefing by the parties as to why both had agreed that cable modem service is a "cable service."

4. Shortly before the Commission issued its *Declaratory Ruling*, this Court rendered its decision in *NCTA v. Gulf Power*, 534 U.S. 327 (2002). Although the Court was urged to reach the cable modem classification issue there, it specifically declined to do so. Instead, the Court cited the Commission proceeding that culminated in the *Declaratory Ruling*, noting that the FCC had already decided that cable modem service was not a "telecommunications service," and twice noting that the FCC had not decided whether that service was a "cable service." 534 U.S. at 337-338. In a separate opinion, the remaining two Justices who did not join the opinion of the Court in *Gulf Power* also cited the Commission proceeding that culminated in the *Declaratory Ruling* as where the classification issue would be addressed

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[6] *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000), *rev'd on other grounds sub nom. NCTA v. Gulf Power*, 534 U.S. 327 (2002).

and noted, with no apparent preference, the conflict between the *Henrico* decision finding cable modem to be a "cable service" and the *Portland* decision finding it to be a "telecommunications service." *Id.* at 349-50 nn. 1 & 2, 354-55 & n.5 (Thomas, J., concurring in part and dissenting in part).

5. Cross-Petitioners filed comments and reply comments in the Commission proceeding that led to the *Declaratory Ruling*, arguing that cable modem service is a "cable service." In March 2002 the Commission issued the *Declaratory Ruling*, 17 FCC Rcd 4798 (2002) (FCC App. at 40a-181a), that gave rise to this litigation, and concluded that cable modem service is neither a "cable service" nor a "telecommunications service," but a single, integrated, interstate "information service." The Commission generally declined to follow *Portland* (FCC App. at 114a-116a), and although it concluded that cable modem service is not a "cable service," it did not cite *Portland* at all in its "cable service" analysis (*id.* at 118a-132a). Rather, it relied on the different rationale that "one-way transmission" in § 522(6)(A) means that, to be a "cable service," a cable operator must have editorial control over service content and that, while operators do exercise some control over cable modem service content, they do not exert control over most of it. *Id.*

The Commission construed the term "transmission" in 47 U.S.C. § 522(6)(A) as requiring the cable operator to exercise "control over the selection of content offered to subscribers." (*Id.* at 121a-122a.) Conceding that "some cable operators or their affiliated ISPs may themselves produce or obtain the rights to content" included in cable modem service, the Commission nevertheless concluded that cable modem service did not satisfy the "transmission" requirement because "cable

operators do not control the majority of information accessible by cable modem subscribers." (*Id.*)

With regard to the phrase "or use," added to 47 U.S.C. § 522(6)(B) in 1996, the Commission rejected the argument that this addition "bring[s] cable modem service within the definition of cable service." (*Id.* at 127a-128a.) The Commission did not address the plain, and broad, meaning of the phrase, "or use." And the Commission also acknowledged that the *1996 Conference Report* explaining that phrase states that it was intended "to reflect the evolution of cable to include interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services." (FCC App. at 126a.) The Commission, however, disdained reliance on the *1996 Conference Report* because, in its view, "the language of the statute itself does not reflect [the intent expressed in the legislative history]." (*Id.* at 126a-127a.)

The Commission likewise spurned the argument that the 1998 Internet Tax Freedom Act[7] supports the conclusion that cable modem service is a "cable service." Recognizing that the ITFA contains an exemption for cable franchise fees, an exemption that would seem superfluous if cable modem service were not a "cable service," the Commission nevertheless concluded that, since the ITFA was enacted after the 1996 amendment to the "cable service" definition and did not alter that definition, it was not dispositive. (*Id.* at 131a.)

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[7] Pub. L. No. 105-277, Div. C, Title XI, §§ 1100-1104, 112 Stat. 2681-719 (1998) ("ITFA"), *codified at* 47 U.S.C. § 151 note.

Ultimately, the Commission rested its decision that cable modem service is not a "cable service" on its view that the "transmission" requirement of § 522(6)(A) requires a cable operator to "be in control of selecting and distributing content" and that, because the subscriber rather than the operator is in "ultimate control" of what the Commission called the "Internet experience," cable modem service does not satisfy the cable operator control requirement of "transmission." (*Id.* at 127a-129a.) According to the Commission, that "discrete parts of cable modem service have characteristics of cable service" does not matter because cable modem service is an "integrated" service that "is predominately Internet access." (*Id.* at 130a-131a.)

6. Cross-Petitioners filed a timely petition for review of the *Declaratory Ruling* in the D.C. Circuit. Other parties filed petitions for review of the *Declaratory Ruling* in the D.C., Third and Ninth Circuits. By random assignment pursuant to 28 U.S.C. § 2112, the cases were consolidated in the Ninth Circuit, home of the *Portland* decision. On October 6, 2003, the court of appeals issued a per curiam opinion affirming in part, vacating in part, and remanding the *Declaratory Ruling*. The per curiam opinion held that *stare decisis* bound the court of appeals to *Portland*, and that cable modem service therefore was not a "cable service" or a single, integrated "information service," but instead contained a separate "telecommunications service" component. (FCC App. at 3a-22a.) Judge O'Scannlain wrote a separate concurrence stating that while he felt bound by *stare decisis*, he was uncomfortable with that result. (*Id.* at 22a-25a.) Judge Thomas, the author of *Portland*, wrote separately to state that he viewed the question as "one of pure statutory interpretation" not subject to deference and that, even if he were not bound by *stare decisis*, he would still reach the same result as he did in *Portland*. (*Id.* at 25a-39a.) Because of

stare decisis, none of the panel opinions addressed the merits of Cross-Petitioners' arguments that cable modem service is a "cable service."

7. On March 31, 2004, the court of appeals denied petitions for rehearing en banc, including a petition filed by Cross-Petitioners, with Judge O'Scannlain voting to grant rehearing en banc. (FCC App. at 205a-207a.)

REASONS FOR GRANTING THE CROSS-PETITION

If the Court grants the Federal Petitioners' petition in No. 04-281 or the NCTA Petitioners' petition in No. 04-277, or both, it should grant this cross-petition as well. Cross-Petitioners agree with the Federal Petitioners and NCTA Petitioners (and the *Declaratory Ruling* under review) that cable modem service is an "information service." For that very reason, however, we disagree with the *Declaratory Ruling*'s conclusion that cable modem service is not also a "cable service." Indeed, as a result of the 1996 amendment expanding the "cable service" definition, cable modem service is a "cable service" precisely because it is an "information service" that a "cable operator makes available to all subscribers generally," 47 U.S.C. § 522(14), and includes all upstream subscriber interaction that "is required for the ... *use* of such [information made available to all subscribers generally]," 47 U.S.C. § 522(6)(B) (emphasis added).

Due to peculiar procedural circumstances, however, the court of appeals has never addressed the merits of this "cable service" argument. In *Portland*, the court of appeals did not address these arguments because it decided the case on grounds not argued by the parties and thus without the benefit of full briefing of the "cable service" issue. And in the panel

decision under review, a case assigned to it randomly under 28 U.S.C. § 2112, the court of appeals never addressed the merits of Cross-Petitioners "cable service" arguments because it felt itself bound by *Portland*. Had the petitions for review of the *Declaratory Ruling* been consolidated and transferred to any other circuit, each of the arguments for the proper classification of cable modem service -- for "cable service," for "information service" and for "telecommunications service" -- would have received complete review, free from the dead-hand *stare decisis* effect of *Portland*. And any other circuit also would have reviewed whether and to what extent deference was due the Commission's decision under *Chevron*.

Given these circumstances, the Court should grant review with all of the potential cable modem service classifications -- "information service," "cable service," and "telecommunication service" -- before it. These alternatives are, of course, the ones this Court recognized in its decision in *Gulf Power*, decided after *Portland*. *See* 534 U.S. at 337-38, & 349-50 nn. 1 & 2, & 354-55 & n. 5) (Thomas, J., concurring in pat and dissenting in part). The question the Court left open in *Gulf Power* should now be resolved. An issue of such immense importance deserves no less.

I. THE COURT SHOULD REVIEW THE COMMISSION'S DECISION UNDER THE PROPER *CHEVRON* STANDARD.

In reviewing agency decisions such as the *Declaratory Ruling*, courts normally apply the familiar two-prong test adopted by this Court in *Chevron*: (1) whether Congress has spoken to the statutory question at issue and, if so, whether the agency's interpretation is consistent with congressional intent; and (2) if the statutory language is instead ambiguous, whether the agency's construction of the statute is a

reasonable one.

Rather than applying *Chevron* here, however, the court of appeals held that *stare decisis* gave it no choice but to follow the statutory construction it had previously adopted in *Portland*. As a result, the court of appeals failed to address either of the two *Chevron* prongs, or the parties' arguments on the merits on each of these prongs. Thus, in the case of the "cable service" classification issue, the court of appeals did not even consider Cross-Petitioners' arguments that (1) the only way to read several provisions of the Communications Act, the pertinent legislative history, and the ITFA together in a consistent way is to classify cable modem service as a "cable service," and (2) even if the statute were ambiguous, the rationale offered by the *Declaratory Ruling* as to why cable modem service is not a "cable service" is not a reasonable interpretation of the statute.

The only question truly addressed by the court of appeals involved the interplay between *stare decisis* and *Chevron*. And the court of appeals answered that question incorrectly. It could be argued that if this Court grants certiorari, it should end its inquiry with this question. The Federal Petitioners and the NCTA Petitioners, however, have not requested that the Court remand this case with instructions that the Ninth Circuit engage in the appropriate *Chevron* analysis in the first instance, but instead appear to request that this Court engage in that analysis in the first instance. Cross-Petitioners join these petitioners in this sentiment.

While it is true that the Court ordinarily will not address questions in the first instance that have not been passed upon below, it has done so on occasion. *See*, *United States v. Mendenhall*, 446 U.S. 544 (1980); *Youakim v. Miller*, 425 U.S. 231 (1976). In *Mendenhall*, the Court ruled on an

argument presented by the United States even though the court below had not considered the argument. This Court held that the assumption of the lower courts rested on a misapprehension of federal constitutional law, requiring correction. The Court also held that the determination of the unpassed upon question was essential to the disposition of the case. The Court therefore considered the question to be "fairly comprised" by the questions presented in the petition for certiorari. This is one of those rare exceptions where such action is warranted. The sheer importance of the issue calls for a speedy resolution. The Court should rule on the substance of the proper classification of cable modem service and consider all of the possible classifications of cable modem service. Moreover, since the *Chevron* analysis is a purely legal one, there is no need to remand for additional facts.

If, however, the Court were to conclude otherwise, Cross-petitioners request that, at a minimum, the Court grant review and remand the case to the court of appeals with instructions to review the *Declaratory Ruling* -- and all three of the classification alternatives ("cable service," "information service" and "telecommunications service") -- under the *Chevron* standard.

II. THE *DECLARATORY RULING*'S CONCLUSION THAT CABLE MODEM SERVICE IS NOT A "CABLE SERVICE" DOES NOT SURVIVE *CHEVRON* REVIEW.

We agree with the Federal Petitioners (FCC Pet. at 14) that the regulatory status of cable modem service is an issue of "vital importance" justifying this Court's review. We disagree, however, with the apparent view of the Federal Petitioners and the NCTA Petitioners that review of the *Declaratory Ruling* implicates only the second prong of

Chevron and that application of that prong yields a pro forma upholding of the Commission's decision (FCC Pet. at 16). To the contrary, at least with respect to the Commission's conclusion that cable modem service is not a "cable service," the *Declaratory Ruling* fails both the first and second prongs of *Chevron*.

A. The *Declaratory Ruling*'s "Cable Service" Analysis Is Flawed Under The First Prong of *Chevron*.

Under the first prong of *Chevron*, the question is whether Congress has spoken on the statutory question, 467 U.S. at 842-43. As this Court has observed, under the first prong of *Chevron*, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, 229 (1994). *Accord*, *Pittston Coal Group v. Sebben*, 488 U.S. 105, 113 (1988); *Public Employees Retirement System v. Betts*, 492 U.S. 158, 171 (1989); *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980). Nor does *Chevron* permit an agency to cast aside the ordinary tools of statutory construction, such as the legislative history and language in related statutory provisions. *E.g.*, *Chevron*, 467 U.S. at 843 & n.9.

That is especially true here where, unlike the typical *Chevron* case, the issue presented involves the meaning of a term, "cable service," that Congress itself chose to define. Congress wrote an elaborate definition, separately defining several components of the "cable service" definition, *see* 47 U.S.C. §§ 522(6), 522(14) & 522(20), and amplifying its intent still further with extensive discussions of the "cable service" definition in the legislative history, both in 1984 and

1996. Because Congress spoke so comprehensively on the "cable service" definition, deference would be inappropriate:

> Had Congress not provided a 'precise definition ... for the exact term the Commission now seeks to redefine,' ...., the Commission's interpretation might well be entitled to deference. In the face of a clear statutory definition, however, these is no occasion for deference.[8]

Yet, in deciding that cable modem service is not a "cable service," the Commission's *Declaratory Ruling* casts aside all of the rules of statutory construction that this Court counseled in *Chevron* should be considered. Those rules of construction point clearly to the conclusion that Congress intended "cable service" to include all "information services" made available to subscribers generally over a cable system, meaning that cable modem service is a "cable service."

Congress has defined "cable service" as:

> (A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection *or use* of such video programming or other programming service.

47 U.S.C. § 522(6) (emphasis added). Congress added the phrase "or use" in the Telecommunications Act of 1996, and the plain meaning of "use" -- encompassing *any* type of

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[8] *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 190 (D.C. Cir. 1995) (citing and quoting *ACLU v. FCC*, 823 F.2d 1554, 1568 (D.C. Cir. 1987)).

"interaction" required for "use" of "other programming service" -- is quite broad. The *1996 Conference Report*, the most reliable form of legislative history,[9] confirms this broad plain meaning, leaving no doubt as to Congress' purpose in expanding the "cable service" definition:

> The conferees intend the amendment [adding "or use" to the "cable service" definition] to reflect the evolution of cable to include *interactive services* such as game channels and *information services* made available to subscribers by the cable operator, as well as *enhanced services*.[10]

"Other programming service" is defined broadly as "information that a cable operator makes available to all subscribers generally." 47 U.S.C. § 522(14). The legislative history describes this definition's broad language as encompassing non-video, on-line services, such as "computer video games," and "news services, stock market information, and on-line airline guides" created by third parties that are used by and useful to only subscribers with computers.[11]

It cannot seriously be disputed that cable operators make cable modem service "available to all subscribers generally," or that cable modem service permits all subscribers to surf the same websites, to join the same chat rooms, to scan the same message boards, and to obtain the same "information" that is

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[9] *E.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 44 n.7 (1986).

[10] *1996 Conference Report* at 169 (1996), *reprinted in* 1996 U.S.C.C.A.N. at 182 (emphasis added).

[11] H.R. Rep. No. 934, 98th Cong., 2d Sess. 42-44 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4679-81.

"generally available" to each cable modem subscriber. The 1996 amendment, in turn, means that subscriber-specific "*use*" of such "other programming service" is a "cable service."

This conclusion is supported not only by the plain language and legislative history of the "cable service" definition, but by other statutory provisions and Commission decisions as well. Another provision of Title VI of the Communications Act, for instance, refers to local cable franchising authorities' ability to "establish requirements for video programming *or other information services*," 47 U.S.C. § 544(b)(1) (emphasis added), a reference that makes no sense unless, as the language and legislative history of § 522(6) clearly contemplate, "cable service" includes *both* "video programming" and "other information services" offered to subscribers over a cable system. Similarly, in the ITFA, originally enacted in 1998, just two years after Congress expanded the "cable service" definition, Congress explicitly exempted cable franchise fees under 47 U.S.C. § 542 from the Internet tax moratorium, an exemption that would be meaningless surplusage if, as the *Declaratory Ruling* and the court of appeals concluded, cable modem is not a "cable service."

Yet the *Declaratory Ruling* sidesteps these guides to statutory construction. It ignores half of the "cable service" definition (47 U.S.C. § 522(6)(B)), downplays the broad definition of "other programming service" in 47 U.S.C. § 522(14), effectively repeals the 1996 addition of "or use" to § 522(6)(B), avoids the pertinent 1984 and 1996 legislative histories that are at odds with its position, dismisses the reference to "information services" in § 544(b), and reduces a provision of the ITFA to surplusage (FCC App. at 118a-132a).

The Commission's goal is clear: To satisfy its preferred policy objective of placing cable modem service and other forms of broadband Internet access into the same regulatory category. *See, e.g., Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Notice of Proposed Rulemaking*, 17 FCC Rcd 3019 (2002). But in construing the definition of "cable service," the Commission's task "is to determine not what [cable service] *ought* to mean, but what it *does* mean." *Atlantic Mutual Ins. Co. v. Comm'n of Internal Revenue*, 523 U.S. 382, 387 (1998) (emphasis in original). The Commission's "estimations of desirable policy cannot alter the meaning" Congress gave to "cable service." *MCI Telecommunications*, 512 U.S. at 234. That meaning, as revealed by the plain language of § 522(6) and its component parts, the 1996 and 1984 legislative histories, and the ITFA, points to but one conclusion: cable modem service is a "cable service."

B. The *Declaratory Ruling*'s "Cable Service" Analysis Likewise Fails The Second Prong of *Chevron*.

Even assuming *arguendo* that the statute is ambiguous as to whether cable modem service is a "cable service," and thus the deferential second prong of *Chevron* applies, the Commission's conclusion that cable modem service is not a "cable service" still must be reasonable -- that is, it must be based on a permissible construction of the statute. *Chevron*, 467 U.S. at 843. Yet the *Declaratory Ruling* does not even clear that hurdle.

As an initial matter, it cannot be reasonable for the Commission, in construing the statutorily-defined term "cable service," to essentially write half of the definition -- § 522(6)(B) -- out of the statute, to give no meaning at all to

Congress' explicit expansion of the "cable service" definition in 1996, and to ignore that the Commission's narrow construction of the "cable service" definition would render language in other statutory provisions -- 47 U.S.C. § 544(b) and the ITFA -- meaningless or nonsensical. But the *Declaratory Ruling*'s conclusion on the "cable service" issue is unreasonable for the additional reasons that it is internally inconsistent and departs without explanation from the Commission's own prior precedent.

The core of the Commission's reasoning as to why cable modem service is not a "cable service" is that "one-way transmission" in § 522(6)(A) means that, to be a "cable service," a cable operator must have editorial control over cable modem service, and according to the Commission, cable operators do not possess such control. (FCC App. at 121a-122a & 127a.) Yet this reasoning flies in the face of the *Declaratory Ruling*'s finding that cable modem service often includes "access to content that [cable] operators have created or aggregated ... specifically for the benefit of their subscribers," such as "content targeted to a specific locality, *much as cable operators do in their video service offerings*."[12] And the Commission is also inexplicably mute about its own recognition, both in the rulemaking accompanying the *Declaratory Ruling* and the Commission's own earlier decision, that cable operators do in fact have "absolute

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[12] FCC App. a 55a-56a (emphasis added). *See also id.* at 122a & 130a (cable operators and their affiliated ISPs "may themselves produce or obtain the rights to content accessible through their websites" and [i]nclud[e] proprietary information or packages of pre-selected web site links in [cable modem] services").

control" over all content delivered via cable modem service.[13] That cable operators have, so far at least, voluntarily chosen not to exploit that control more fully by blocking some Internet content -- or, more accurately, that operators have made the editorial decision that, at this time, it is in their marketplace (or strategic regulatory) interest to provide unfiltered Internet access content -- does not, and cannot, alter the fact that they possess such control.

Finally, even if the Commission's "editorial control" rationale on the "cable service" question were not internally inconsistent in these respects, the *Declaratory Ruling* never resolves the inherent tension between, on the one hand, its lack-of-editorial-control rationale for cable modem service not being a "cable service" and, on the other hand, its rationale for cable modem service not containing a separate "telecommunications service" component. If it really is true, as the *Declaratory Ruling* suggests, that cable operators have no editorial control over cable modem service content, then by process of elimination that content must then be controlled by cable modem service users -- *i.e.*, cable modem subscribers and website hosts. But if that were true, then the *Declaratory Ruling*'s conclusion that cable modem service does not contain a separate "telecommunications service" element must be wrong. The Commission simply cannot have it both ways.

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[13] *Applications for Consent to Transfer of Control of Licenses by Time Warner and America Online to AOL Time Warner*, 16 FCC Rcd. 6547, 6586, ¶87 & n. 275 (2001); *Internet Over Cable*, Notice of Proposed Rulemaking, 17 FCC Rcd. at ¶87 (2002) (FCC App. at 146a).

III. THE COURT OF APPEALS' AFFIRMANCE OF THE COMMISSION'S "CABLE SERVICE" RULING ON THE ALTERNATIVE RATIONALE OF *PORTLAND* IS CONTRARY TO PRECEDENT OF THIS COURT.

Even assuming *arguendo* that the court of appeals was correct in feeling itself bound by its prior decision in *Portland*, it should not have affirmed the Commission's ruling on the "cable service" issue. Instead, this Court's precedent makes clear that the court of appeals should have vacated and remanded the "cable service" issue as it did with the balance of the *Declaratory Ruling*.

The court of appeals should not have relied on the rationale of *Portland* to affirm the *Declaratory Ruling*'s "cable service" conclusion because the Commission did not rely at all on *Portland*'s rationale in reaching that result. In fact, the *Declaratory Ruling* generally rejects the Ninth Circuit's reasoning in *Portland* (FCC App. at 114a-116a), and does not even refer to *Portland*, much less rely on it, in concluding that cable modem service is not a "cable service" (*id.* at 118a-132a). For example, the *Declaratory Ruling* never suggests, as did *Portland*, 216 F.3d at 877, that applying certain Title VI provisions to cable modem service would "lead to absurd results," and for good reason: Each of the provisions cited in *Portland*, 47 U.S.C. §§ 531, 532, 534, & 535, applies only to "video programming," 47 U.S.C. § 522(20), and thus would be inapplicable to "other programming service," 47 U.S.C. § 522(14), which is the prong of the "cable service" definition applicable to cable modem service. FCC App. at 122a-123a. *See also Internet Ventures*, 15 FCC Rcd 3247 (2000).

Because the *Declaratory Ruling* relied on different reasoning than *Portland*, this Court's precedent is clear that the court of appeals could not properly affirm the *Declaratory Ruling*'s result on the "cable service" issue on the alternative ground of the reasoning in the court of appeals' earlier decision in *Portland*. *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). As this Court has held, "an agency's action must be upheld, if at all, on the basis established by the agency itself." *Motor Vehicle Mfrs' Assn. v. State Farm*, 463 U.S. 29, 50 (1983). Accordingly, the court of appeals' decision to affirm, rather than to vacate and remand, the *Declaratory Ruling*'s "cable service" conclusion was clearly in error.

IV. THE CLASSIFICATION OF CABLE MODEM SERVICE HAS ENORMOUS POTENTIAL FISCAL CONSEQUENCES FOR THE NATION'S LOCAL GOVERNMENTS.

Prior to the *Declaratory Ruling* in March 2002, the vast majority of cable operators nationwide treated cable modem service as a "cable service" and included revenues from cable modem service revenues in the 5% cable franchise fee they paid to local governments under 47 U.S.C. § 542. After the *Declaratory Ruling*, however, cable operators ceased including cable modem service revenues in franchise fee payments.

The financial impact on local governments of denying them bargained-for compensation in the form of the 5% cable franchise fee on revenues generated by cable modem service is enormous. Cable modem service revenues in the United States are estimated to be $9.4 billion per year by the end of

2005.[14] Assuming that cable modem service annual revenue is $9.4 billion, the *Declaratory Ruling* means that, collectively, local governments stand to lose as much as $470 million in cable franchise fees per year. Clearly, revenue losses of that magnitude have enormous adverse financial consequences for the nation's local governments. These revenues would be available for any number of projects and services that make communities safer and more livable, and provide high quality education services to allow citizens to make full use of the rapid changes in technology. In addition, the revenues are often used to maintain and repair infrastructure where cable services equipment, including lines for the use of cable modem services, are located. Without these revenues, citizens are subsidizing cable providers access to that infrastructure.

Nor can it be seriously suggested that payment of franchise fees on cable modem service has had any discernible adverse impact on the deployment or subscribership of cable modem service. As Robert Sachs, President and CEO of NCTA testified before Congress on July 21, 2003, "It's really hard to believe that cable modem service has existed as a consumer service only for about seven years, *with most deployment and growth taking place since 1999.*"[15] It was not until the spring of 2002 that the Commission declared cable

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[14] *See* CISCO SYSTEMS INC., RESIDENTIAL CABLE SERVICES 1 at http://www.cisco.com/application/pdf/en/us/guest/netsol/ns289/c714/ccmigration_09186a008014e05f.pdf.

[15] *Regulation of Broadband Hearing Before the House Comm. On Energy and Commerce, Subcommittee on Telecommunications and the Internet*, 2003 WL 21694487 (F.D.C.H.) (July 21, 2003) (statement of Robert Sachs, President & Chief Executive Officer, National Cable & Telecommunications Association).

modem service to be an information service, placing it outside local government ability to impose a cable franchise fee. Yet cable modem service experienced much of its greatest growth in deployment and subscribership during a time when cable operators were paying local governments the 5% cable franchise fee on cable modem service.

Whether or not one agrees that the only way to read the cable service-related statutory provisions, legislative history and prior Commission decisions together in a consistent way is to conclude that cable modem service is a "cable service," these arguments should not be swept under the rug by a peculiar convergence of procedural circumstances: the arguments not being raised in *Portland* because the panel there elected to reach and decide an issue not briefed by the parties, this case having been assigned to that court of appeals randomly under 28 U.S.C. § 2112, and that court of appeals' consequent failure to confront the merits of the "cable service" arguments due to the *stare decisis* effect of *Portland*. One way or another, these arguments merit full judicial review and resolution on the merits. The cable modem service classification issue is one of clear nationwide and exceptional importance, as it affects not only hundreds of millions of dollars in local cable franchise fees for the nation's local governments under 47 U.S.C. § 542, but also the regulatory framework applicable to the most widely subscribed-to form of broadband Internet access.

CONCLUSION

If the petitions for a writ of certiorari in either 04-181 or 04-177, or both, are granted, then this conditional cross-petition also should be granted.

Respectfully submitted,

HENRY W. UNDERHILL
SONA N. PANCHOLY
LANI L. WILLIAMS
INTERNATIONAL
LAWYERS ASSOC.
1110 VERMONT AVE., NW
SUITE 200
WASHINGTON, D.C 20005
202-266-5424

TILLMAN L. LAY*
COUNSEL OF RECORD
MILLER, CANFIELD,
PADDOCK AND STONE, PLC
1900 K STREET, N.W.
SUITE 880
WASHINGTON, D.C. 20006
202-429-5575

APPENDIX A

STATUTORY APPENDIX

1. 47 U.S.C. 544 provides in pertinent part

(b) Requests for proposals; establishment and enforcement of requirements

In the case of any franchise granted after the effective date of this subchapter, the franchising authority, to the extent related to the establishment or operation of a cable system--

(1) in its request for proposals for a franchise (including requests for renewal proposals, subject to section 546 of this title), may establish requirements for facilities and equipment, but may not, except as provided in subsection (h) of this section, establish requirements for video programming or other information services; and
(2) subject to section 545 of this title, may enforce any requirements contained within the franchise--
(A) for facilities and equipment; and
(B) for broad categories of video programming or other services.

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2. Pub. L. No. 105-277, Div. C, Title XI, §§ 1100-1104, 112 Stat. 2681-719 (1998) ("ITFA"), *codified at* 47 U.S.C. § 151 note, provides in pertinent part

MORATORIUM.

(a) MORATORIUM.--No State or political subdivision thereof shall impose any of the following taxes during the period beginning on October 1, 1998, and ending 3 years after the date of the enactment of this Act--

(1) taxes on Internet access, unless such tax was generally imposed and actually enforced prior to October 1, 1998; and

(2) multiple or discriminatory taxes on electronic commerce.

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DEFINITIONS.

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(8) TAX.--
(A) IN GENERAL.--The term "tax" means--
(i) any charge imposed by any governmental entity for the purpose of generating revenues for governmental purposes, and is not a fee imposed for a specific privilege, service, or benefit conferred; or
(ii) the imposition on a seller of an obligation to collect and to remit to a governmental entity any sales or use tax imposed on a buyer by a governmental entity.
(B) EXCEPTION.--Such term does not include any franchise fee or similar fee imposed by a State or local franchising authority, pursuant to section 622 or 653 of the Communications Act of 1934 (47 U.S.C. 542, 573), or any other fee related to obligations or telecommunications carriers

under the Communications Act of 1934 (47 U.S.C. 151 et seq.).

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